

MEMORANDUM OF LAW

DATE: October 24, 1994

TO: Staa Heshimu, Management Assistant

FROM: City Attorney

SUBJECT: Citizens' Review Board on Police Practices - Access to
Complainants on a Voluntary Basis

QUESTION PRESENTED

The Citizens' Review Board on Police Practices ("Board") has asked if they have the authority to request interviews with complainants regarding a specific complaint against a police officer. The Board has suggested conducting these interviews during their review of the investigatory file submitted to them by the Police Department Internal Affairs Unit ("IA"). The Board has indicated the complainants would be asked to respond voluntarily and would be under no compulsion or coercion if they choose not to respond.

SHORT ANSWER

There is presently no authority for the Board to interview complainants, either voluntarily or otherwise. However, the City Manager may adopt rules which might authorize the Board to conduct such interviews with certain limitations.

San Diego Charter (Charter) section 43(d) grants the City Manager exclusive authority to formulate rules and regulations governing the operation of the Board. Although no limitations on this managerial authority are found in other sections of the Charter, any rules and regulations so drafted must be formulated so that they are reasonable and allow the Board to fulfill its duties without undue restrictions. Assuming the Charter can be construed to allow interviews of complainants by the Board, and assuming the Manager adopts appropriate rules that allow this practice, there would be no express legal prohibition barring the Board's proposal. There are, however, some structural and legal issues that must be considered by the City Manager before a decision to implement an interview process by the Board on a voluntary basis is made.

I

BACKGROUND

After a person files a complaint against a police officer, the complaint is sent to IA for investigation. During the IA investigation,

all parties, including the officer, the complainant, and both civilian and department witnesses, are interviewed. At the completion of the investigation, IA files a written report and makes a finding that the allegations are "sustained," "not sustained," "exonerated," or "unfounded."

Thereafter, the report by IA, as well as all evidence accumulated during the course of IA's investigation, such as tapes of interviews or photographs, are submitted to a Board team for review. Subsequent to the team review, the case is sent to the full Board for review. After the review, the Board approves or disapproves IA's findings and may, at that time, add comments. It is during this two-step review process that the Board wishes to have the authority to interview complainants on a voluntary basis.F

Since the Board does not have subpoena power, they may not compel a complainant to be interviewed by the Board. This memorandum addresses only the Board's request to know if it is permissible for them to "invite" the complainant to be interviewed by them.

II

AUTHORITY OF THE MANAGER UNDER THE CITY CHARTER TO PROMULGATE RULES FOR THE BOARD TO CONDUCT INTERVIEWS OF THE COMPLAINANT

San Diego City Charter ("Charter") section 43(d) and the Board's by-laws enumerate the powers and limitations of the Board. Charter section 43(d) states that the Board is empowered to "review and evaluate citizens' complaints against members of the San Diego Police Department and the San Diego Police Department's administration of discipline arising from such complaints." Note that the language specifies the Board may "review and evaluate." No authority is granted to the Board by the Charter to independently investigate the complaints filed by citizens. The phrase "review and evaluate" might be construed, however, to include interviews by the Board as such interviews could be an aid in any "evaluation" of a citizen complaint. However, the legislative history of Proposition G does not strongly support this interpretation.

At the time of the adoption of Charter section 43(d), two proposed Charter amendments were placed on the ballot. Proposition F, which received a smaller number of favorable votes than did Proposition G, provided in pertinent part: "The purpose of the Commission is to investigate, conduct hearings, and make findings concerning allegations of Police misconduct in a prompt, fair and impartial manner."

Proposition G, which was ultimately adopted and is noted above, is the current Charter section 43(d). The distinct difference in the language of the two propositions creates a serious question as to whether the Charter allows independent interviews by the Board.

It should be noted also that litigation ensued after the vote on

propositions F and G in which the court found propositions F and G to be alternative propositions which could not be reconciled. The court further found the ballot language was sufficient to inform the voters only one of the propositions would be adopted. Therefore, despite argument by the Appellant that both propositions could be adopted, the court found Proposition G, having received the highest number of affirmative votes, would prevail. The City Council adopted a resolution which reflected the courts determination and states:

Proposition G received the affirmative vote of a majority of the qualified voters voting on such proposition. Inasmuch as Propositions F and G are conflicting propositions dealing with the same subject matter in conflicting terms, Proposition G prevails to the exclusion of Proposition F because it received the highest affirmative vote. Cal. Const., art. 2, sec. 10(b); Cal.

Elections code section 4016 and San Diego Municipal Code section 27.2527.

Assuming the Charter can be construed to allow interviews of complainants under Charter section 43(d), despite the legislative history, the City Manager is vested with the authority to establish rules and regulations that are necessary for the Board to carry out its functions of reviewing and evaluating citizens' complaints.F

The vote between the two proposed Charter amendments also addressed the issue of who would promulgate rules and regulations for the Board. Proposition F provided, in pertinent part: "The Commission shall establish such rules and regulations as may be necessary to carry out the purposes for which the Commission is created." By adopting Proposition G, the voters determined the Manager was the appropriate authority within which to vest that power.

The only restriction on this authority is that such rules and regulations (also called "by-laws") be consistent with the laws of the state and implicitly reasonable. The only legal basis for challenging the bylaws would be if the bylaws unduly hamper the Board in carrying out its duties as defined by the Charter. Assuming the City Manager approves the voluntary interview concept, the Board may, through amendment to the by-laws, be granted the authority to conduct interviews of complainants on a voluntary basis.

III

CONFLICTS WITH THE BOARD'S BY-LAWS AS
POTENTIAL LIMITS ON THE BOARD'S AUTHORITY TO
INTERVIEW COMPLAINANTS

The by-laws specifically define the powers of the Board. Pursuant to the Charter, these by-laws do not grant the Board investigatory powers. Rather, the by-laws outline the explicit procedures the Board must follow in carrying out its review and evaluation functions. Under the Board's Policies and Procedures section 6.3(C), once the Board has reviewed the IA investigatory file, it may do any one of the following:

- (1) Agree with the findings/no comment.
- (2) Agree with the findings/with comment.
- (3) Disagree with the findings/no comment.
- (4) Disagree with the findings/with comment.
- (5) Request additional information.

¶emphasis addedo

If the Board determines more information is necessary for proper resolution of the case, "the Executive Director, with the approval of the City Manager, shall return the investigation to the Chief of Police and the Internal Affairs CommanderF

The restructuring of the police department eliminated the position of Commander. The appropriate person to request information from now would be the IA Assistant Chief. The by-laws should be amended to reflect this change. to provide the additional

information." Section 6.3(C)(5). Under the by-laws the Board is not authorized to interview any party to the complaint whether or not it is on a voluntary basis. All investigation is to be conducted by IA. The by-laws give the Board only the power, with the approval of the City Manager, to return the file to IA for further investigation. The Board may, of course, direct specific questions to IA for further investigation. IA then conducts further interviews of the parties to respond to the Board's concerns. As the by-laws are currently written, the practice of questioning complainants who respond to the Board's request for an interview is not permissible. If an act would be in contravention of the by-laws, amendments to the by-laws consistent with the provisions of Charter section 43(d) must be made.

The case of *Aguilar v. Johnson*, 202 Cal. App. 3d 241 (1988), points out the need for specific amendment to the by-laws if a change is made. In that case, the court held that since Penal Code section 832.5 required the City to have a written policy concerning the handling of citizens' complaints, any oral modifications were invalid. *Id.* at 248. The chief of police, on his own initiative, had, by oral direction, delayed an investigation of a citizen's complaint against an officer because of pending legal action. However, an express written policy required the city attorney to explicitly advise the chief of police to delay the investigation. The court held the chief's oral modification to be in contravention of the written procedures and thus invalid. *Id.* at 248.

Therefore, the by-laws must be formally amended in order for the Board to legally implement a policy which allows complainants to be interviewed on a voluntary basis.

IV

PUBLIC SAFETY OFFICERS' PROCEDURAL BILL OF RIGHTS AS POTENTIAL LIMIT ON THE BOARD'S AUTHORITY TO INTERVIEW COMPLAINANT'S

Under Article 41 of the Memorandum of Understanding ("MOU") between the City and the Police Officers' Association ("POA"), if the Board interviews a citizen complainant, the interview would probably be construed as an "investigation."F

Investigation is defined in the MOU as: "the process of conducting inquiry(ies) into the actions or conduct of an officer(s) from the moment it is reasonably apparent that such inquiry(ies) may lead to punitive action or criminal allegations directed toward an officer or officers. MOU Art. 41, II(A)(3). While the Board's conclusions are only "advisory", its conclusions may have an impact on the officer's employment and may be taken into consideration if disciplinary action is taken against the officer.

As such, the Public Safety Officers'

Procedural Bill of Rights ("Act") (California Government Code sections 3300 et seq.) could potentially be invoked. "The Act sets forth a list of basic rights and protections which must be afforded all police officers by the public entities which employ them." Baggett v. Gates, 32 Cal. 3d 128, 135 (1982).

Currently, the Act comes into play if the Board makes disciplinary recommendations to the department, even if the recommendations are not followed. For instance, if the Board reviews a complaint and agrees with IA's decision to discipline an officer, and includes adverse comments on the officer's conduct, this comment will be included in the IA file. Under these circumstances, Government Code sections 3305 and 3306 would be implicated. Under Section 3305, an officer must be provided with the opportunity to read and sign any adverse comment put into his or her personnel file and, under Section 3306, an officer is granted 30 days to respond to any adverse comment entered into his or her personnel file. In Aguilar v. Johnson, 202 Cal. App. 3d 241, the chief of police argued that Sections 3305 and 3306 referred only to comments by law enforcement personnel. The court, however, stated: "The statutes make no such distinction between adverse comments made by law enforcement personnel and adverse comments made in the form of citizens' complaints. Rather, both sections refer to any adverse comments." Id. at 250. (Emphasis in original.) Similarly, Section 3305 makes no distinction between personnel files or IA files. The Act clearly states no adverse comments may be entered into an

officer's "personnel file, or any other file used for personnel purposes by his employers." (Emphasis added.)

Since the officer has already been interrogated by IA and reviewed and signed any IA findings prior to the time the Board gets the file, it is arguable that Government Code section 3305 would attach and all comments by the Board must be made available to the officer. Additionally, Article 41 of the MOU, which parallels but adds to the Act, provides at Section 5(D): "Other Negative Material - Any officer who has material negative to his/her employment relationship or a satisfactory performance evaluation containing negative comments placed in his/her personnel file may appeal the placement of such material to a ranking officer of not less than the rank of Captain." Therefore, each adverse comment by the Board triggers a second administrative disciplinary appeal on the same issues previously addressed by IA. In order to ensure that neither the Act nor the MOU is violated, the Board should assume that the Act will apply and strictly adhere to all the due process requirements. Specifically, the Board should notify the officer that it will be interviewing the complainant and insure the officer has an opportunity to review any adverse comments generated by the Board.

V

CONFIDENTIALITY OF PEACE OFFICER RECORDS AS POTENTIAL LIMIT ON THE BOARD'S AUTHORITY TO INTERVIEW COMPLAINANTS

Under Penal Code section 832.7(a),

Peace officer personnel records and
records maintained by any state or local
agency pursuant to Section 832.5, or
information obtained from these records, are
confidential and shall not be disclosed in
any criminal or civil proceeding except by
discovery pursuant to Sections 1043 and 1046
of the Evidence Code.

While Section 832.7 does not expressly provide that these records may not be disclosed in an investigatory proceeding, such as the proceeding conducted by the Board, in a Memorandum of Law dated October 6, 1989, from Assistant City Attorney John M. Kaheny, the City Attorney expressed the view that "underlying all of the protections in the Public Safety Officers' Procedural Bill of Rights (Government Code sections 3300 et seq.) is the assumption that the strict rules of confidentiality found in Penal Code sections 832.5, 832.7 and 832.8 apply to investigations of police misconduct."

This view is further supported by 71 Ops. Cal. Att'y Gen. 1, 5 (1988), in which the Attorney General stated, "Where . . . citizens' review board has authority to inspect citizens' complaints against peace officers they are required by Penal Code section 832.7 to

maintain the confidentiality of such complaints and are precluded from disclosing the contents thereof to members of the public."

As the court noted in *Parrott v. Rogers*, 103 Cal. App. 3d 377, 383 (1980), "a disclosure by one official or department to another is not a 'public disclosure.'" However, a complainant is not an official or agent of the City and is not entitled to the same information as is the Board. In *San Francisco Police Officers' Assn. v. Superior Court*, 202 Cal. App. 3d 183, 192 (1988), the court stated, "access is afforded to the complainant only to non-confidential OCC records prior to the hearing." (Emphasis added.)

Thus, if the Board interviews a complainant during its closed sessions,

Under the Brown Act (Cal. Govt. Code section 54950 et seq.), the Board is required to meet in closed session when discussing complaints, personnel, or other information specifically exempt from public disclosure law. See also, Cal. Govt. Code section 54957. Section 3.8(E) of the Board's by-laws also requires that the Board meet in closed session for these matters.

the Board must ensure that nothing confidential that has been received through the confidential IA files will be disclosed to the complainant during the course of the interview. This will make interviewing the complainant procedurally difficult because the Board will be constrained in its questioning by the provisions of Penal Code section 832.7. It may not use any information provided by the IA interviews in formulating its questions for the complainant. Additionally, in all likelihood, the subject officer would want to have an attorney or representative present during the interview to ensure the officer's rights are protected and no confidential information is disclosed. This would, in itself, be a questionable practice because neither the officer, the officer's attorney nor the officer's representative has the right to attend interviews of complainants.

VI

THE MEYERS-MILIAS BROWN ACT AS POTENTIAL LIMIT ON THE BOARD'S AUTHORITY TO INTERVIEW COMPLAINANTS

Implementation of this proposal may constitute a change in the working conditions of the officers. Thus, the meet and confer provisions of the Meyers-Milias-Brown Act, Government Code sections 3500 et seq., may be implicated. This will require the City's Labor Relations Manager to meet and confer in good faith with the POA prior to any changes being implemented.

VII

POLICY DETERMINATIONS AS POTENTIAL LIMIT ON THE BOARD'S AUTHORITY TO INTERVIEW

COMPLAINANTS

Finally, fundamental fairness and due process might require that the Board not form opinions concerning the credibility and veracity of the subject officer based upon a statement of facts from a single interested party in the incident. Due process requires an officer be given an opportunity to respond to charges or allegations lodged against him or her. However, given the restrictions and protections of the Act, it is highly unlikely that a police officer would respond to a request from the Board to be interviewed even if the Board had the authority to do so. Whatever decisions the Board reaches may thus be tainted by the one-sided presentation of the facts.

CONCLUSION

There is no express authority for the Board to interview complainants and it is questionable whether the Charter can be construed to allow such interviews. If it is, the Manager may adopt rules that would allow this practice. Should the Manager adopt such rules, the proposal is still fraught with numerous problems that must be addressed prior to implementation of the proposal.

Both Charter section 43(d) and the Board's own by-laws limit the Board's authority to interview witnesses. The Act has procedural safeguards with which the Board must comply if it is to interview complainants and the City Manager may be required to meet and confer with the POA pursuant to the requirements of the MMBA.

Finally, while the Board may amend its by-laws to permit voluntary interviews, Charter section 43(d) says that the City Manager must approve all Board rules. Implementation of any rule changes must first be submitted to the City Manager for approval.

If you have any further questions, or need additional information, please let me know.

JOHN W. WITT, City Attorney

By

Sharon A. Marshall

Deputy City Attorney

SAM:mrh:pev:920.12(x043.2)

cc: Jack McGrory, City Manager

ML-94-84